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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

DARRIO COLEMAN,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A148069

(Alameda County
Super. Ct. No. 176786)

Darrio Coleman has petitioned for a writ of mandate or prohibition following the denial of his common law motion to dismiss charges for failure to prosecute. Because he has made a slight showing of prejudice due to the delay between the filing of charges and his arrest, and the prosecution has not demonstrated any cause for the delay, we grant the petition. A writ of mandate shall issue directing the superior court to grant the common law motion to dismiss.

BACKGROUND

On November 20, 2013, two Berkeley police officers were working narcotics enforcement. They saw a silver sedan stopped in the center of the roadway on a Berkeley street. A man in a hooded red sweatshirt was standing at the front passenger window speaking with the driver. As the officers approached, the man suddenly ran away. He ignored the officers' command to stop, and discarded a firearm he appeared to retrieve

from the area of his waistband. The man was not apprehended, but one of the officers was able to identify him as Coleman.

A warrant for Coleman's arrest issued on November 22, 2013, upon a felony complaint charging him under Penal Code section 29800, subdivision (a)(1) with possession of a firearm by a convicted felon. Despite the fact that police had an accurate address for him, Coleman was not arrested for this offense until he turned himself in to police on December 4, 2014. When an information was filed following Coleman's preliminary hearing, he moved to dismiss the charges on the grounds that the prosecution was unreasonably delayed between the filing of charges and his arrest more than one year later.

Coleman's showing of prejudice consisted of his declaration stating that after discussing the incident as depicted in the police report with his lawyer, he had no recollection of where he was or what he was doing on November 20, 2013. He also did not have any records, such as from work or school, which could help him remember. At the hearing, Coleman argued the reporting officer's inability at the preliminary hearing to remember details from the day of the gun possession incident added to his showing of prejudice.

The trial court denied the motion on the basis that Coleman's declaration was so general in its assertion of his inability to remember the day of the incident or what he was doing that it did not present a credible showing of prejudice. After his motion for reconsideration was denied, Coleman filed this petition for writ relief.

We issued a temporary stay of the proceedings in the superior court and directed the People to oppose Coleman's petition for writ. Our order notified the People pursuant to *Palma v. U.S. Fasteners, Inc.* (1984) 36 Cal.3d 171 that if circumstances warrant we may issue a peremptory writ in the first instance.

DISCUSSION

I.

Initially, the Attorney General argues this petition for writ of mandate should be dismissed because it is successive to an earlier petition Coleman filed in this court

challenging the denial of his statutory motion to dismiss filed pursuant to Penal Code section 995. The attorney general relies upon *In re Clark* (1993) 5 Cal.4th 750, 767 which discusses the general rule in habeas corpus cases that courts will not consider repeated applications of previously rejected claims. Two aspects of the discussion in *Clark* lead us to entertain this petition. The rule is discretionary and courts retain the authority to entertain a successive petition for relief. The rule is rooted in giving effect to final and valid judgments and such concerns are not implicated to the same degree in a challenge to an interlocutory order. The issues were also presented here to the superior court by a non-statutory motion to dismiss, unlike the earlier motion brought under penal code section 995 which typically challenges the sufficiency of the pleading on the basis of the record developed at the preliminary hearing. (*Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1596.) For these reasons, we will consider this petition.

II.

Article I, section 15 of our state constitution provides criminal defendants the right to a speedy trial. California's right to a speedy trial has been held to be broader than the federal right in that it attaches as early as the filing of a complaint and thus covers prearrest delay. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910.) But there is no presumption of prejudice for delay that occurs between the filing of a complaint and a defendant's arrest. (*Ibid.*) Instead, a defendant must show he has been prejudiced by the delay. If he does so, the burden shifts to the prosecution to show the justification for delay. Then, the court balances the harm to the defendant against the justification shown by the prosecution. (*Id.* at p. 911.)

Here, Coleman provided evidence that he could not remember where he was on the day of the alleged offense, more than one year before his arrest. He described some general measures he undertook to help his memory. He discussed the incident as depicted in the police report with his lawyer and he tried to locate personal records that could help him remember where he was or what he was doing on the critical day. A persistent lack of memory of the time surrounding events alleged in a complaint may provide a showing of prejudice where reasonable attempts have been made by a

defendant to refresh his recollection. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 250.) On this record, Coleman made a showing of prejudice, albeit one that was scant of detail. But the testimony of a single witness is sufficient to prove a fact (Evid. Code, § 411), and “the trier of fact may not arbitrarily disregard the uncontradicted or unimpeached testimony of a witness, unless that testimony is inherently improbable.” (*DeMiglio v. Mashore* (1992) 4 Cal.App.4th 1260, 1270.) There was nothing inherently improbable about the testimony provided by Coleman’s declaration. In fact, he provided the kind of detail our Supreme Court has suggested should be proffered by a defendant challenging a prosecution on speedy trial grounds. (See *Serna v. Superior Court, supra*, 40 Cal.3d at p. 250.) The burden thus shifted to the People to provide a reason for the more than one-year delay between the filing of the complaint and the day Coleman turned himself in to police. But the People have provided none.

DISPOSITION

The stay previously issued by this court is dissolved, and a writ of mandate shall issue remanding this case to the superior court with directions to dismiss the information.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

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